IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

MARK NORWOOD, Plaintiff/Appellee, v. BARRY FELTNER and RICK FELTNER, Defendants/Appellants.	2 CA-CV 2006-0162 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 28, Rules of Civil Appellate Procedure

APPEAL FROM THE SUPERIOR COURT OF COCHISE COUNTY

Cause No. CV200400053

Honorable Stephen M. Desens, Judge

AFFIRMED

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Attorney for Plaintiff/Appellee

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P E L A N D E R, Chief Judge.

¶1 In this appeal from an order granting summary judgment and quieting title to certain real property in Willcox in favor of appellee Mark Norwood, appellants Barry and Rick Feltner urge this court to reverse on equitable grounds. Finding no error, we affirm.

BACKGROUND

¶2 "On appeal from a grant of summary judgment, we view all facts and reasonable inferences therefrom in the light most favorable to the party against whom judgment was entered." *Bothell v. Two Point Acres, Inc.*, 192 Ariz. 313, ¶ 2, 965 P.2d 47, 49 (App. 1998). Mark and Norah Norwood were divorced in California in 1992. In the decree of dissolution, a California court ordered the property at issue here sold and the sale proceeds divided. Pursuant to the decree, after payment to Norah of $3,000 from Mark's share, the net proceeds were to be divided equally between him and Norah. The California decree was filed in Cochise County in 1997.

¶3 For reasons that are not clear in the record, the property was not sold.[1] Norah died in 1997. Mark claims, and the Feltners do not dispute, that title to the property automatically passed to Mark because they had held title as joint tenants with right of survivorship. About seven years later, in 2004, Mark filed this action, seeking to quiet title

[1]Without citing anything in the record, the parties disagree in their briefs as to why the property was not sold. We note with disapproval that both sides' briefs do not properly cite the record and, therefore, fail to comply with Rule 13(a)(4) and (b), Ariz. R. Civ. App. P., 17B A.R.S.

in the property against Rick and Barry Feltner,[2] Norah's sons, who claimed an interest in the property as Norah's heirs based on the dissolution decree. The trial court granted Mark's motion for summary judgment, ruling that the Feltners' "interest in . . . the real property . . . by virtue of the Judgment of Dissolution of Marriage . . . or on any other grounds, [was] barred by statutes of limitations." This appeal followed.

DISCUSSION

¶4 The Feltners argue the trial court erred in granting summary judgment because it denied them the opportunity to present evidence "in support of equitable arguments including equitable estoppel and unjust enrichment." Without citing anything in the record, they contend that the property was not sold "because of acts and omissions by [Mark]" and that he created "a sweetheart deal for himself" by failing to comply with the dissolution decree. The Feltners further argue the trial court's ruling "completely ignore[d] the . . . wording and . . . intent of the Divorce Decree" and, by "focus[ing] exclusively on the legal issues," "ignored the equities" that they urge. "On appeal from a summary judgment, we must determine *de novo* whether there are any genuine issues of material fact and whether the trial court erred in applying the law." *Bothell*, 192 Ariz. 313, ¶ 8, 965 P.2d at 50.

¶5 Section 12-1551(B), A.R.S., provides:

> An execution or other process shall not be issued upon a judgment after the expiration of five years from the date of its entry unless the judgment is renewed by affidavit or process

[2]Mark's complaint originally named as defendants only Rick Feltner and "any other unknown heirs of Nora Norwood, aka Norah Norwood." Barry Feltner was later "joined as an indispensable defendant."

> pursuant to section 12-1612 or an action is brought on it within five years from the date of the entry of the judgment or of its renewal.

As Mark points out, that statute "act[s] as a statute of limitation on actions to enforce judgments." *See Bruce v. Froeb*, 15 Ariz. App. 306, 307, 488 P.2d 662, 663 (1971) ("[T]he consequence of a failure to timely comply with the renewal provisions . . . is to create a limitation against the further enforcement or effect of a judgment, and thus our Supreme Court has aptly characterized these statutes as 'statutes of limitation'."), *quoting In re Spriggs*, 36 Ariz. 262, 264, 284 P. 521, 521 (1930). Thus, if a party fails to renew a judgment within five years of the date of its entry or last renewal, "no execution can be issued thereon and the statute of limitations has run against the judgment itself." *Spriggs*, 36 Ariz. at 264, 284 P. at 521.

¶6 The record reflects, and Mark agrees, that the 1992 California decree of dissolution was filed in Cochise County in 1997. *See* A.R.S. § 12-1702 (foreign judgment filed in Arizona superior court treated in same manner as judgment of superior court, has same effect, and is subject to same procedures and proceedings as superior court judgment "and may be enforced or satisfied in like manner"). But it is also apparently undisputed that neither Norah nor the Feltners renewed the dissolution decree within five years of its entry or even within five years of its domestication in Arizona. In fact, the 1992 decree was twelve years old when Mark filed this action, and the Feltners do not suggest it was ever renewed. As a matter of law, therefore, that judgment can no longer be enforced against Mark because the statute of limitations "has run against" it. *Spriggs*, 36 Ariz. at 264, 284 P. at 521.

¶7 The Feltners, however, argue the trial court should have "consider[ed] the equitable issues," namely equitable estoppel and unjust enrichment. Preliminarily, we note that, although the Feltners argued in the trial court that "[t]here [we]re legal and equitable issues" in the case, the record does not show they specifically presented their equitable estoppel or unjust enrichment theories below.[3] Arguably, therefore, those arguments are waived. *See Orfaly v. Tucson Symphony Soc'y*, 209 Ariz. 260, ¶ 15, 99 P.3d 1030, 1035 (App. 2004) ("[A]rguments raised for first time on appeal are untimely and, therefore, deemed waived."). Because Mark neither asserts nor argues waiver, however, we address the Feltners' arguments and find them without merit. *See State v. Sullivan*, 187 Ariz. 599, 601, 931 P.2d 1109, 1111 (App. 1996) ("Because the state has not alleged waiver, . . . we reach the substantive evidentiary issues raised by appellant.").

¶8 "'Equitable estoppel involves, generally speaking, an affirmative misrepresentation of a present fact or state of facts and detrimental reliance by another thereon.'" *Arnold & Assocs., Inc. v. Misys Healthcare Sys.*, 275 F. Supp. 2d 1013, 1023 (D. Ariz. 2003), *quoting Tiffany, Inc. v. W.M.K. Transit Mix, Inc.*, 16 Ariz. App. 415, 419, 493 P.2d 1220, 1224 (1972). And, "[i]n order to establish equitable estoppel, a party must show: (1) affirmative acts inconsistent with a claim afterwards relied upon; (2) action by a party relying on such conduct; and (3) injury to the party resulting from a repudiation of

[3]We note that the trial court held a hearing on Mark's motion for summary judgment, but it does not appear that a court reporter attended the hearing, and the record contains no transcript of that hearing.

such conduct." *John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, ¶ 10, 96 P.3d 530, 535 (App. 2004).

¶9 The Feltners assert that "[a] fair determination of whether equitable estoppel is appropriate is impossible to evaluate in this case without testimony and evidence." But they neither alleged nor presented any evidence in support of a claim that Mark took affirmative actions inconsistent with his current position or that they acted in reliance on any such actions. Rather, they merely assert in conclusory fashion, as they did below, that a potential sale of the property "did not take place because [of] an intentional lack of action and good faith on [Mark's] part." And they essentially argue Mark improperly obtained a windfall through his misconduct. Such base allegations do not support a claim of equitable estoppel. *See Villas at Hidden Lakes Condos. Ass'n v. Geupel Constr. Co.*, 174 Ariz. 72, 78, 847 P.2d 117, 123 (App. 1992) ("The doctrine of equitable estoppel is not applicable unless one is injured by justifiably relying upon conduct of another intended to induce such reliance."); *see also Farina v. Compuware Corp.*, 256 F. Supp. 2d 1033, 1058 (D. Ariz. 2003). In any event, "estoppel . . . is not . . . a legal basis upon which a judgment barred by A.R.S. § 12-1551 can be revived." *Chudzinski v. Chudzinski*, 26 Ariz. App. 130, 132, 546 P.2d 1139, 1141 (1976).

¶10 The Feltners' unjust enrichment claim is likewise flawed. "To establish a claim for unjust enrichment, a party must show: (1) an enrichment; (2) an impoverishment; (3) a connection between the enrichment and the impoverishment; (4) the absence of justification for the enrichment and the impoverishment; and (5) the absence of a legal

remedy." *Trustmark Ins. Co. v. Bank One*, 202 Ariz. 535, ¶ 31, 48 P.3d 485, 491 (App. 2002); *see also Arnold & Assocs.*, 275 F. Supp. 2d at 1024-25; *Murdock-Bryant Constr., Inc. v. Pearson*, 146 Ariz. 48, 53, 703 P.2d 1197, 1202 (1985). The Feltners do not discuss how these factors might apply in this case, nor do they cite any authority applying the principle of unjust enrichment to facts similar to those presented here. *See* Ariz. R. Civ. App. P. 13(a)(6), 17B A.R.S. But, in view of the clear mandate in the 1992 decree that Mark sell the property and the undisputed fact that he did not do so, but rather, kept the property, the record arguably suggests Mark was enriched while the Feltners were impoverished as a result of those facts.

¶11 Nonetheless, the Feltners failed to demonstrate an "absence of justification" for any such enrichment. *Trustmark*, 202 Ariz. 535, ¶ 31, 48 P.3d at 491. "The mere fact that one party confers a benefit on another . . . is not of itself sufficient to require the other to make restitution. Retention of the benefit must be unjust." *Pyeatte v. Pyeatte*, 135 Ariz. 346, 353, 661 P.2d 196, 203 (App. 1983). And, although Mark might have been enriched because title to the property has now been quieted in his name, the record does not establish that any such enrichment is unjust. Norah or the Feltners had a duty to renew the dissolution decree in a timely manner or face its dormancy, at which point "execution or other process shall not be issued." § 12-1551; *see also Goodwin v. Hewlett*, 147 Ariz. 356, 358, 710 P.2d 466, 468 (App. 1985). It is not unjust for the law to hold the Feltners to the consequences of the failure to renew the judgment they now seek to enforce.

¶12 Indeed, any time a prevailing party fails to renew a judgment in his or her favor, the party against whom judgment was entered likely will be enriched. Thus, allowing a claim of unjust enrichment in this context would undermine the purpose of § 12-1551 and essentially render it meaningless. *Cf. Jepson v. New*, 164 Ariz. 265, 274, 792 P.2d 728, 737 (1990) (allowing relief under savings statue when "an action is terminated for lack of prosecution" and no diligence has been shown "would undermine the policies the savings statute was intended to serve" and "provid[e] an out for litigants who, for no good reason, fail to comply with the rule"); *see also Doe v. Roe*, 191 Ariz. 313, ¶ 29, 955 P.2d 951, 960 (1998) ("The purpose of the statute of limitations is to 'protect defendants and courts from stale claims where plaintiffs have slept on their rights.'"), *quoting Gust, Rosenfeld & Henderson v. Prudential Ins. Co.*, 182 Ariz. 586, 590, 898 P.2d 964, 968 (1995). In sum, the trial court did not err in granting summary judgment and quieting title in Mark's favor.

DISPOSITION

¶13 The judgment of the trial court is affirmed.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

GARYE L. VÁSQUEZ, Judge